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No. _____

In The

Supreme Court of the United States

October Term, 1997

WALTER V. CROSS, a/k/a "BOBO";
JULES C. MELOGRANE and NUNZIO MELOGRANE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Predicate to Question 1

Petitioners (Defendants below) were convicted *inter alia* of conspiracy to deprive citizens of their civil rights in violation of 18 U.S.C. Section 241. Defendants Cross and Nunzio Melograne were, respectively, a supervisor and a tipstaff to a state court judge Raymond P. Scheib. Judge Scheib heard *de novo* appeals such as traffic violations, summary offenses and license suspensions, from courts of minor judiciary. Defendant Jules C. Melograne was a member of the minor judiciary. The theory of the government's case was essentially that these three individuals deprived certain appeal litigants of their right to a fair and impartial tribunal by conducting *ex parte* communications with Judge Scheib concerning these cases. The judge was not charged nor did he testify. Therefore, no evidence was introduced which indicated that the *ex parte* communications changed the outcome of any of the statutory appeals, nor did any evidence suggest that the state court judge was actually biased by the communications.

Defendants' convictions occurred before this Court's decision in *United States v. Lanier*, 117 S. Ct. 1219 (1997). The jury was essentially charged that defendants could be convicted if they had substantially impaired the litigants' right to a "fair and impartial tribunal", without further definition of that phrase. The Third Circuit affirmed the convictions after the *Lanier* decision, finding that "no other cases leaves open whether prejudicing a judge against a defendant violates a defendant's right to a fair and impartial trial", but without addressing this Court's precedent which holds that allegations of general bias

QUESTION PRESENTED – Continued

and prejudice are insufficient to establish a Constitution violation.

Question 1 DID THE COURT OF APPEALS ERR AS A MATTER OF LAW IN HOLDING THAT *EX PARTE* COMMUNICATIONS WITH A JUDGE CONSTITUTES AN OBVIOUS CRIMINAL VIOLATION OF THE "RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL" WITHOUT REFERENCE TO THIS COURT'S DECISIONS WHICH HOLD THAT GENERAL ALLEGATIONS OF BIAS OR PREJUDICE ARE INSUFFICIENT TO ESTABLISH A CONSTITUTIONAL VIOLATION?

LIST OF PARTIES

Petitioners (Defendants below), Walter V. Cross, Jules C. Melograne, and Nunzio Melograne, are adult citizens of the Commonwealth of Pennsylvania. Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Walter V. Cross, Jules C. Melograne, and Nunzio Melograne (hereinafter "Defendants"), respectfully pray that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceedings.

OPINION

The opinion of the United States Court of Appeals for the Third Circuit, filed on October 21, 1997 is reported at 128 F.3d 145 (3d Cir. 1997) and is included in Petitioner's Appendix A at page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was filed on October 21, 1997. Rehearing was timely sought by both the government and the Defendants. Rehearing was denied by Orders dated January 16, 1998. This Petition for Writ of Certiorari is sought within 90 days of this judgment and is timely pursuant to 28 U.S.C. Section 2101 and Rule 13(3) of the Rules of Court for the Supreme Court of the United States.

STATUTES INVOLVED

1. Pursuant to 18 U.S.C. Section 241, it is unlawful for: "two or more persons [to] conspire to injure . . . any person in any . . . state or commonwealth . . . in the free-exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

2. 18 U.S.C. Section 242 reads, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; . . .

STATEMENT OF THE CASE

A. Statutory Appeals Court

As part of a three-count[1] indictment, Defendants were charged with conspiracy to commit mail fraud in violation of Title 18 U.S.C. Section 1341 and conspiracy to

[1] Only Counts I and II were tried. Counts III through XII, involving Defendant Jules C. Melograne alone, were not tried and were dismissed after the verdict.

deprive unnamed citizens of their civil rights in violation of 18 U.S.C. Section 241 during a period encompassing December 6, 1990 through July 28, 1993. The indictments centered around the Defendants' involvement with the Statutory Appeals division of the Court of Common Pleas of Allegheny County, Pennsylvania.

The Statutory Appeals division hears appeals of matters adjudicated in courts of minor judiciary. Courts of minor judiciary, under the supervision and administrative control of the President Judge of the Court of Common Pleas, adjudicate various matters, including summary offenses, traffic violations, and license suspensions. Statutory appeals are basically *de novo* rehearings of these cases originally heard at the minor judiciary level for which appeals to the Common Pleas Court are authorized by law.

At all relevant times, Walter V. Cross a/k/a "Bobo" was an Allegheny County employee assigned to duties as supervisor of statutory appeals. The supervisor of statutory appeals determined when defendants, attorneys and witnesses were present so the cases could be heard. Indictment, Criminal No. 94-233,¶ 8, (App. 38).

Nunzio Melograne was employed by Allegheny County as tipstaff to the judge assigned to hear statutory appeals. The tipstaff maintained order, reviewed case files to make sure paperwork was in order, and performed other clerical duties related to the statutory appeal hearings. *Id.* at ¶ 9 (App. 38). During the relevant period, the Common Pleas Court judge assigned to hear statutory appeals was primarily the Honorable Raymond

L. Scheib, although other judges sat in statutory appeals court at times.

Courts of minor judiciary outside of the City of Pittsburgh in Allegheny County were presided over by district justices who were elected by popular vote for six year terms. Jules C. Melograne was district justice of district court 5-2-17 which served the boroughs of Whitehall and Castle Shannon and Baldwin Township. Indictment,¶ 5, (App. 37).

B. Indictment

Count I of the indictment charged Defendants with conspiracy to commit mail fraud in violation of 18 U.S.C. Section 371. The indictment alleged that all three Defendants "did knowingly, willfully and unlawfully combine, conspire, confederate and agree to devise and execute a scheme and artifice to defraud the Commonwealth of Pennsylvania and to deprive the citizens of Allegheny County of their intangible right of honest services of government employees, furthered by use of the United States mails . . . " Indictment,¶ 10, (App. 38).

It was alleged that Defendants:

> (a) caused prosecutions in statutory appeals court to be dismissed by causing cases to be called before police officers arrived at court, and by requesting and permitting police officers to leave before testifying so that actors would be found not guilty due to absence of prosecution witnesses

(referred to throughout the trial as the "A prong" of the conspiracy);

(b) contrived on behalf of others to bring about unfavorable dispositions for particular actors (the "B prong"); and

(c) contrived to obtain favorable disposition for actors (the "C prong"). Indictment,¶ 11 (a)-(c) (App. 39).

Specifically, the government claimed Defendants, *inter alia*,

Engaged in conversations with others to cause particular defendants to be found guilty in statutory appeals cases.

Made notations on a daily trial list regarding cases which were to be "fixed".

Used the term "CAV" in discussions with others to designate those cases in statutory appeals which were to be "fixed" and thus should be taken under advisement.

Arranged to have cases which were fixed taken under advisement by the statutory appeals judge.

Utilized their position of trust to make recommendations[2] to the statutory appeals judge

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[2] Significantly, the Indictment did not charge that any judge improperly decided a case. The government did not produce any judge who testified that his or her decisions were improperly or inappropriately affected in any way by alleged discussions he or she had with Cross or the Melogranes.

> regarding disposition of cases taken under advisement which were to be fixed.

Indictment, Count I, ¶¶ 13-21, (App. 39-41).

In Count II, the government claimed Defendants' conduct, specifically bringing about unfavorable dispositions for certain individuals (the "B prong"), constituted a conspiracy to deprive citizens of the free exercise of their right to a fair and impartial tribunal for resolution of statutory appeals from minor judiciary adjudications in Pennsylvania and, therefore, deprived those citizens of liberty and property without procedural due process of law, in violation of the Fourteenth Amendment of the United States Constitution and 18 U.S.C. Section 241. Indictment, Count II, ¶ 2, (App. 68). The government based this civil rights charge on matters in which the conspirators had allegedly procured guilty verdicts – the 28 "B" prong or the "to be found guilty" cases. In these cases, Cross and the Melogranes, the government charged, conspired to deprive defendants appearing before the Statutory Appeals Court of their fundamental due process right to a fair hearing before an impartial tribunal.

The government's evidence at trial consisted of testimony of a former co-worker, a former assistant district attorney, police officers, litigants and introduction of numerous wiretaps of Judge Scheib's courtroom and chambers.

Witnesses testified that Cross told the judge in one case to "find this sucker guilty" and on another occasion, the defendant was found guilty after Cross' prompting to the judge even though the assistant district attorney at

the hearing had attempted to withdraw the charge on the ground that the evidence did not demonstrate a violation. However, Judge Scheib, the decision-maker, was not called to testify that input from Cross was unwelcome, if not encouraged by him.[3]

In another case, FBI agents recorded one of Cross' telephone conversations in which the husband of an accident victim, a court employee, called Cross and asked that the case against the woman who had caused the accident be heard first on its scheduled hearing date. In the course of their discussion, Cross asked "You want her guilty, right?" After the caller replied affirmatively, Cross assured him "Guilty? No problem." (App. 915). The litigant in the statutory appeal, Marcia Ochs, had a full hearing before Judge Scheib at which time she pled guilty to failing to stop at the stop sign and the court gave her 30 days to produce proof of insurance on the charge of failing to have insurance at the time of the accident (proof of financial responsibility). (App. 1301-1316). Nunzio

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[3] The prosecutor stated in his closing: "The evidence in this case . . . does not show there is any direct evidence that these defendants caused the guilty verdict [sic]. There could be no direct evidence unless the judge was to testify, yes, I was influenced by what they did." (App. 307). The prosecutor directed the jury only to circumstantial evidence of their statements that they could influence the verdicts and the fact that 24 such cases resulted in guilty verdicts. Of the 24 cases cited by the prosecutor, 11 resulted in reduced sentence or fines as compared with those assessed at the district justice level, or not guilty verdicts on some or all counts. Further, 3 of the 24 cases resulted in guilty verdicts because the litigant failed to file a timely appeal or the litigant refused to take an oath or affirm at the time of the hearing. (App. 1441-1469).

Melograne explained to the court employee Judge Scheib's ruling giving Ochs 30 days to produce proof of insurance, which was actually a better result than she had obtained at the magistrate level. (App. 992-993). Later in the day, the court employee again called Cross, at which time Cross explained that if she did not bring in her evidence of insurance, then "we'll burn her ass" (i.e., reinstate the magistrate's conviction) (App. 925). The statement was, therefore, entirely consistent with Judge Scheib's ruling.

Cross testified essentially that Judge Scheib wanted to be informed of calls to his chambers by individuals concerned about certain cases, welcomed and encouraged his input on cases, and that Scheib even authorized him to discuss cases directly with police officers to see if hearings could be avoided by the officers voluntarily leaving without testifying. Neither Melograne testified.

After a lengthy jury trial, all three Defendants were convicted of both conspiracy to commit mail fraud and conspiracy to violate civil rights. On April 12, 1996, each Defendant was sentenced to *inter alia* thirty (33) months confinement. A timely joint appeal was filed on April 22, 1996. (App. 1468). The district court granted bond pending appeal. Based upon a motion of all three Defendants and consent of the government, these appeals were consolidated for the purposes of briefing and argument. (App. 1470).

C. Third Circuit Ruling

The Court of Appeals held[4] that the evidence indicated that Cross and the Melogranes had agreed to use their best efforts to cause the judge in the "to be found guilty" cases to "consider factors other than the merits of the case and to find against the defendant" . . . Third Circuit Opinion at 6 (Appendix at A7). The panel acknowledged the requirement that the Defendants must have been provided with prior fair notice that this agreement would violate Section 241, but the Court reasoned since the fundamental due process right of a defendant in a criminal case to an impartial tribunal was "so well established," and because that right was "so clearly subverted by an agreement of this kind", it rejected the contention that fair notice was not provided. In reaching this decision, the Court cited three cases which dealt tangentially with the issue of a "fair and impartial tribunal." The Court acknowledged that all of these cases dealt with the concept of bias on the part of the decision-maker and that no case ever imposed criminal liability under Section 241 for conducting *ex parte* communications with a decision-maker. Opinion at 7-8 (A9).

The Court went on to cite language from *United States v. Lanier*, 117 S. Ct. 1219 (1997) (decided after the verdict in this case) in support of its rationale that a prior conviction on analogous facts is not necessary. The Court

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[4] The Court of Appeals reversed the conspiracy to commit mail fraud convictions based upon the failure of the government to prove the "use of mail" element. The Court then ordered resentencing on the civil rights counts, effectively dismissing the mail fraud counts. Opinion at 3 (A4).

considered the right to a fair and impartial tribunal to be one which applied with "obvious clarity"

to the specific conduct in question. The Court did not consider cases cited by the defendants which questioned whether, under Supreme Court precedent, general bias or prejudice of a decision-maker rises to the Constitutional level.

The government filed for panel rehearing on the reversal of the mail fraud convictions. The Defendants filed for rehearing as to the affirmance of the civil rights convictions. Both rehearing petitions were denied by the Court of Appeals for the Third Circuit by Orders dated January 16, 1998, (attached as Appendix B and C). Pursuant to the Motion of the Defendants, the Third Circuit, by Order dated February 13, 1998, stayed issuance of the certified judgment in lieu of formal mandate until February 25, 1998, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. (Attached as Appendix D).

REASON FOR GRANTING THE WRIT OF CERTIORARI

THE THIRD CIRCUIT'S INTERPRETATION OF THIS COURT'S DECISION IN *UNITED STATES V. LANIER* CONFLICTS WITH AT LEAST TWO OTHER CIRCUITS IN THAT IT FINDS "FAIR NOTICE" TO OFFICIALS OF THE UNCONSTITUTIONALITY OF THEIR CONDUCT IN AREAS WHERE CONSTITUTIONAL RIGHTS HAVE NOT BEEN CLEARLY SETTLED.

In *United States v. Lanier*, 117 S. Ct. 1219 (1997), this Court reversed the *en banc* decision of the Sixth Circuit,

which had vacated the civil rights conviction of a judge who had sexually assaulted employees and litigants who had appeared before him. The Court held that the Sixth Circuit had used an incorrect standard when it required, as proof of notice of the criminality of the conduct alleged to violate the Constitution, a Supreme Court decision directly on point. Rather than reinstate the conviction, however, the Court remanded the case to the Sixth Circuit for application of the proper standard.

The proper standard was defined by the *Lanier* Court to require that: "the prior decisions [give] reasonable warning that the conduct at issue violated constitutional rights." *Id.* at 1227. The Court went on to state that "[i]n some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Id.*

Rather than apply this standard, the Third Circuit panel seized on language found later in the *Lanier* decision:

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The panel concluded:

> This case falls squarely within the language just quoted. No earlier case leaves open whether

> prejudicing a judge against a defendant violates the defendant's right to a fair and impartial trial; rather, the "general constitutional rule already identified in the decisional law" - that people are entitled to fair adjudication of their guilt before an impartial tribunal - "applies with obvious clarity to the specific conduct in question."

Opinion at 8-9 (A11-12).

What the panel failed to address, however, is that several cases, including Supreme Court and Third Circuit decisions, leave open, if not outright reject, the proposition that conduct which falls short of injecting **actual bias** into the decision-making process involves a constitutional dimension, let alone could support a constitutional crime conviction.

This Court, for example, has recognized that not "all questions of judicial qualifications . . . involve constitutional validity. Thus, matters of kinship, **personal bias**, state policy, remoteness of interest was seen generally to be matters of legislative discretion." *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, 820-21 (1986) (emphasis added). *See also, Tumey v. Ohio*, 273 U.S. 510 (1927); *United States v. Green*, 544 F.2d 138, 146-147 n. 16 (3d Cir. 1976).

Although all of the cases cited by the Third Circuit panel in support of the argument that this was an "easy" constitutional question: *In Re: Murchison*, 349 U.S. 133 (1955); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); and *Sill v. Pennsylvania State University*, 462 F.2d 463 (3d Cir. 1972), do stand for the proposition that a defendant is entitled to a fair and impartial tribunal, none question the *Aetna Life* line of cases which hold that only **actual** bias of

a decision-maker against a litigant rises to a constitutional level. Therefore, the panel's opinion, while correctly recognizing that due process requires more than notice and an opportunity to be heard, does not address the issue of whether the conduct at issue, which at bottom amounts to no more than *ex parte* communications with a judge, involves any more than non-constitutional personal bias as defined by *Aetna Life* and its progeny. As such, the panel did not follow *Lanier's* mandate to require a "very high degree of prior factual particularity" in the face of, at a minimum, an open, if not disputed, question of constitutional law.

It is clear that *Aetna Life* has both continued vitality and that its teaching conflicts with the cases relied upon by the Third Circuit panel. The Supreme Court, as recently as 1990, refused certiorari where the Supreme Court of Illinois had upheld a sentence of death issued by a trial judge who had previously taken part in the prosecution of the defendant for another murder. *People v. DelVecchio*, 129 Ill. 2d 265, 544 NE 2d 312 (1989), *cert. denied sub nom. DelVecchio v. Illinois*, 494 U.S. 1062 (1990).

Justice Marshall and Justice Brennan, dissenting from the denial of certiorari, acknowledged that the Court had previously only considered the constitutionality of an adjudicator burdened by a "direct personal substantial, pecuniary interest" in a case before him, citing *Tumey v. Ohio*, 273 U.S. 510 (1927), and allegations that the judge was influenced by "generalized hostility toward certain kinds of private businesses" citing *Aetna, supra*. The dissenters acknowledged that addressing petitioner's Fourteenth Amendment due process claim would constitute a "very different contention of improper bias on the part of

the trial judge." *DelVecchio v. Illinois*, 494 U.S. 1062, 1063 (1990) (Marshall J. dissenting from denial of certiorari). Therefore, the parameters of what constituted judicial bias was at least an unanswered question in the opinion of at least two justices.

Moreover, during the same term in which *Lanier* was decided (and, of course, after Defendants in the instant case had been convicted of violating this right), the Court reversed the Seventh Circuit Court of Appeals which had held, *inter alia*, that a habeas petitioner, convicted before a judge who himself was later convicted of taking bribes from defendants in criminal cases, had not shown even "good cause" for discovery[5] with his allegation of a deprivation of a due process right to a fair trial before an impartial tribunal. *Bracy v. Gramley*, 117 S. Ct. 1793 (1997).

The court of appeals in *Bracy* had conceded that the habeas petitioner's allegations that: (1) his highly publicized trial was "sandwiched tightly between other murder trials that [the judge] fixed," (2) the judge had appointed one of his own former associates to represent the habeas petitioner, who announced that he was ready to try a capital murder case within a few weeks of the appointment, and that (3) favorable treatment was given to defendants who had paid bribes, created "an appearance of impropriety," but felt those factors not sufficiently compelling to justify presuming "actual judicial bias in petitioner's case." *Bracy v. Gramley*, 81 F.3d 684, 690 (7th Cir. 1996), *revd.* 117 S. Ct. 1793 (1997).

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[5] Pursuant to Rules governing Section 2254 cases, Rule 6(a), 28 U.S.C.A. Section 2254.

Therefore, there clearly existed, at the highest levels of the judiciary, a disagreement as to the contours of the right to a fair and impartial tribunal. This disagreement existed even after petitioners, all low level public officials, were deemed by the Third Circuit to "clearly" have adequate notice of this right.

Moreover, the jury in the instant case was instructed to convict the Defendants if their conduct deprived the statutory appeal litigants of a fair and impartial tribunal, without any explanation of what conduct rises to the level of constitutional violations and without any reference to *Aetna Life's* dichotomy of actual versus personal bias. At a minimum, the jury should have been instructed to convict only if the Defendants intended to cause the judge to be **actually biased** against the litigants.[6]

In short, the panel's analysis does not do what was required of the Sixth Circuit by this Court in *Lanier*: conduct an in-depth analysis of whether settled precedent established that the conduct at issue rose to a constitutional level. In the face of the clear precedent limiting issues of constitutional dimension to those of actual bias of a decision-maker, the panel's decision is therefore contrary to *Lanier*, conflicts with at least two other Circuits, as set forth below, and should be reviewed.

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[6] Additionally, the Third Circuit provided no analysis as to why a new trial is not required where the reversal on the mail fraud charges eliminated the majority of the evidence heard by the jury. The indictment alleged that over 400 cases were "fixed" in some way by Cross and the Melogranes. The government based its civil rights charge only on matters in which the Defendants had allegedly "procured" guilty verdicts, a total of only 28 cases (the "to be found guilty cases").

En banc decisions of the First and Eleventh Circuits following *Lanier* conflict with the panel's approach and demonstrate that the Third Circuit has not properly followed the Supreme Court's pronouncement.

In *Joyce v. Town of Tewksbury*, 112 F.3d 19 (1st Cir. 1997) (*en banc*), the First Circuit granted qualified immunity against section 1983 liability to police officers based upon the "unsettled state of the law" concerning whether police officers could enter a residence without a search warrant to arrest an individual in the absence of exigent circumstances, even though "some members of the *en banc* court consider that [the police officers] entry into the . . . home was of very doubtful legality under the Fourth Amendment." *Joyce*, 112 F.3d at 23.

The dissent in *Joyce* had argued that the warrantless entry into the home "transgressed the clearly established rule laid down by *Steagald v. United States*, 451 U.S. 204 (1981)" and, citing *Lanier*, believed that the principle applied with "obvious clarity to the specific conduct in question." *Joyce*, 112 F.3d at 25; (Selya, J., dissenting). The majority of the First Circuit, however, decided that based upon another Supreme Court case, *United States v. Santana*, 427 U.S. 38 (1976), there was "no settled answer as to the constitutionality of doorway arrests," notwithstanding the fact that the court conceded that a number of facts differentiated the arrest from the *Santana* situation. *Joyce*, 112 F.3d at 22.

In *Jenkins v. Talladega City Board of Education*, 115 F.3d 821 (11th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 412 (1997), the majority also rejected arguments of the dissent that public officials had acted unconstitutionally and,

thus, were not entitled to qualified immunity from a Section 1983 suit. In that case, the court rejected the dissent's position that *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) was sufficiently clear guidance such that public school officials were forewarned that "(twice) strip searching eight-year olds (females) in pursuit of a few (seven) dollars violates the Fourth Amendment." *Jenkins*, 115 F.3d at 829, (Kravitch, S.J., dissenting) (parantheticals added).

The majority of the Eleventh Circuit granted qualified immunity to the defendants, stating that "we will not engage in polemics regarding the wisdom of defendants' conduct in this case; suffice it to say that the defendants likely exercised questionable judgment given the circumstances with which they were confronted." *Jenkins*, 115 F.3d at 828. However, the Eleventh Circuit reasoned that since the constitutionally permissible parameters of a school search established by *T.L.O.*, requiring that the scope be reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction, lack specificity, and since "public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases," the Court was forced to conclude:

> the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that [the defendants] were on notice that their conduct was constitutionally impermissible.

Jenkins, 115 F.3d at 828.

The analysis of *Lanier* given by the First Circuit in *Joyce* and the Eleventh Circuit in *Jenkins* clearly demonstrates that the Third Circuit's decision is contrary to *Lanier*, especially in the context of a criminal case. As in *Joyce*, there is a dichotomy between the cases relied upon by the Third Circuit to point to the presence of a constitutional right, and the *Aetna Life* line of cases which point just as conclusively to a lack of constitutional dimension to the right allegedly violated. *Lanier* does not permit a finding that a constitutional right is "clearly established" when conflicting cases, such as *Aetna Life*, directly challenge the existence of the right. *See, e.g.*, A. Simons, *Being Secure in One's Person: Does Sexual Assault Violate a Constitutionally Protected Right*? 38 B.C.L. Rev. 1011, 1041 (September 1997) (arguing that lack of dissension among courts as to whether conduct violates a constitutionally protected right establishes fair notice).

Consistent with *Jenkins*, even if one were to ignore the *Aetna* line of cases as the Third Circuit did, the cases relied on by the Third Circuit as providing fair notice of the alleged right to a "fair and impartial tribunal" under the Fourteenth Amendment inpermissably require officials "to be creative or imaginative in drawing analogies from previously decided cases" at the peril of a criminal conviction, which is especially unfair where, as here, the cases bear only the faintest factual resemblance to the conduct at issue.

On a broader level, clarification of *Lanier* is desirable and necessary. Without insisting upon a broad-based review of constitutional precedent in these instances, Section 241-242 jurisprudence (as well as § 1983 qualified immunity determinations) will be characterized by far

reaching interpretations of federal constitutional criminal law, bounded not by the fair notice requirement, but only by the imagination of prosecutors and juries. Review of Section 241-242 convictions by the courts of appeals will be relegated to result-oriented opinions affirming convictions based upon the discovery of **any** case law support for a finding that a constitutional right, however amorphous, has been abridged, and without any analysis of conflicting decisions questioning the validity of the very constitutional principle upon which criminal liability is sought to be based, or with questionable analogies to cases bearing only tangentially on the conduct at issue. Moreover, conduct in circuits following the Third Circuit's approach will give rise to criminal liability under Section 241-242, yet the same conduct will be protected from even civil liability by grants of qualified immunity in circuits following the First and Eleventh Circuits' accurate analysis of *Lanier*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully assert that their Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Filed October 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3239, 96-3240, 96-3241

UNITED STATES OF AMERICA

v.

WALTER V. CROSS, a/k/a Bobo
Appellant in No. 96-3239

JULES C. MELOGRANE
Appellant in No. 96-3240

NUNZIO MELOGRANE
Appellant in No. 96-3241

On appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Crim. Action Nos. 94-cr-00233-1,
94-cr-00233-2, and 94-cr-00233-3)

Argued: August 12, 1997

BEFORE; STAPLETON, GREENBERG and COWEN,
Circuit Judges

(Opinion Filed October 21, 1997)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

A jury in the U.S. District Court for the Western District of Pennsylvania found Appellants Walter Cross, Jules Melograne, and Nunzio Melograne guilty of one count each of conspiracy to deprive Pennsylvania residents of their civil right to fair and impartial trial, 18 U.S.C. § 241, and conspiracy to commit mail fraud, 18 U.S.C. §§ 371 and 1341. All three defendants appeal both convictions. They assert that the civil rights conviction is

based on a vague and undefined theory that cannot support a criminal conviction, and that the only mailings involved were not sufficiently connected to the fraudulent scheme to bring it within the federal mail fraud statute. We hold that established precedent provided clear notice to the defendants that their agreement would constitute a conspiracy to violate a civil right of the victims of that agreement; therefore, we affirm the convictions for conspiracy to violate civil rights. We reverse the mail fraud conspiracy conviction, however, because none of the mailings contemplated in the conspiracy was undertaken "for the purpose of executing" the scheme to defraud Pennsylvania and its citizens of honest government services.

I. Background

From December 1990 through July 1993, Cross and the Melogranes conspired to "fix" cases coming before the Statutory Appeals Division of the Court of Common Pleas of Allegheny County, Pennsylvania (the "Statutory Appeals Court"). In statutory appeals, the court exercises *de novo* review of the decisions of courts of the "minor judiciary" on matters such as traffic offenses and municipal ordinance violations. Jules Melograne was a District Justice who presided over one of the courts of the minor judiciary. Cross was the supervisor of the Statutory Appeals Court in Allegheny County, where he performed a number of duties, including (1) determining when defendants, attorneys, and witnesses (most often police officers) were present to begin hearings, (2) controlling the order of hearings, (3) handling requests for postponements, and (4) signing pay vouchers for police officers

who had appeared as witnesses. Nunzio Melograne was the "tipstaff" for the judge assigned to hear statutory appeals. He kept the court calendar, maintained the case files, called the cases, and swore the witnesses.

Viewing the evidence at trial in the light most favorable to the government, the record indicates that Cross and the Melogranes conspired to influence the decisions of the court in a variety of ways. Most frequently, they would utilize their authority and access to the decision maker to assure resolution of the case in the defendants' favor. Cross repeatedly procured the absence of police officer witnesses at hearings by telling them that they were not needed, asking them to leave, or by calling the hearings early, before the police witnesses had arrived. These tactics led to automatic not-guilty verdicts. *See* Pa. R. Crim. P. 86(f). Cross asked the judge not to rule on certain cases during the hearing, but to take them under advisement, or "c.a.v." After the hearings had concluded, Cross and Nunzio Melograne would accompany the judge to his chambers with the c.a.v. cases, and after fifteen to twenty minutes they would emerge with several not-guilty verdicts. FBI surveillance also recorded Cross discussing defendants being found not guilty "because Jules wants it," App. at 929, presumably referring to Jules Melograne. Witnesses reported that they had observed stars, check marks, or "c.a.v." notations by defendants' names on Cross's trial calendar before they had appeared; such defendants normally were found not guilty or received reduced sentences at their hearings. In addition, Cross was observed accepting food, tickets to sporting events, fruit baskets, and other items despite his office's

policy against employees accepting gifts. Witnesses testified that the gifts had been offered in exchange for promises by Cross to reduce or eliminate citations and to influence hearings.

On other occasions, Cross and the Melogranes would work to assure that a case would be decided against the defendant – as the government called them, the "to be found guilty" cases. One witness testified that she had overheard Cross telling the judge in one case to "find this sucker guilty," and on another occasion, the defendant was found guilty after Cross's prompting to the judge even though the assistant district attorney at the hearing had attempted to withdraw the charge on the ground that the evidence did not demonstrate a violation. In yet another case, FBI agents recorded one of Cross's telephone conversations in which the husband of an accident victim called Cross and asked that the case against the woman who had caused the accident be heard first on its scheduled hearing date. In the course of their discussion, Cross asked, "You want her guilty, right?" and after the caller replied affirmatively, Cross assured him, "Guilty? No problem." App. at 915. Cross later told the victim's husband that "we'll burn her ass." App. at 925.

Nunzio Melograne also was seen speaking to police witnesses on at least one occasion before the police left the court before their hearings. In addition, he kept a notebook listing approximately 170 cases, and the name "Jules," again referring to Jules Melograne, appeared in connection with 82 of those, many of which had been marked on Cross's trial list. At least three cases in which defendants were found not guilty were marked on Cross's trial calendar and listed in Nunzio Melograne's

notebook with the name "Jules." And at least three cases in which a defendant was found guilty appeared in Nunzio Melograne's notebook with the word "guilty," including the one described above where the district attorney attempted to withdraw the charge.

The government based its civil rights charge on matters in which the conspirators had procured guilty verdicts – the "to be found guilty" cases. In these cases Cross and the Melogranes, the government charged, conspired to deprive defendants appearing before the Statutory Appeals Court of their fundamental due process right to a fair hearing before an impartial tribunal. The mail fraud convictions were based on the conspirators' agreement to deprive Pennsylvania and its citizens of their own honest services as public employees.[1] It was alleged that, in furtherance of this agreement, they caused the mail to be used to transmit notices of case dispositions to parties and the Pennsylvania Department of Transportation.

The district court properly exercised jurisdiction under 18 U.S.C. § 3231, and we invoke jurisdiction under 28 U.S.C. § 1291 to review the district court's final order of conviction. Because each of Appellants' challenges is based on the district court's construction of statutes and case law, we will exercise plenary review. *Epstein Family*

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[1] The government argued before us that the alleged mail fraud conspiracy had two objectives: to deprive citizens of the honest services of public employees and to deprive the Commonwealth of fines. Without objection from the government, however, the case was submitted by the district court to the jury as a conspiracy with the single objective of depriving citizens of the honest services of the defendants. App. at 242-43; 1109-11.

Partnership v. Kmart Corp., 13 F.3d 762, 765-66 (3d Cir. 1994).

II. Conspiracy to Violate Civil Rights

The statute under which the defendants were convicted, 18 U.S.C. § 241, makes it a crime for "two or more persons [to] conspire to injure . . . any person in any . . . state or Commonwealth . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The evidence indicates that Cross and the Melogranes agreed to use their best efforts to cause the judge in the "to be found guilty" cases to consider factors other than the merits of the case and to find against the defendant. Cross and the Melogranes insist that they had no fair notice that this agreement would violate § 241. Because the fundamental due process right of a defendant in a criminal case to an impartial tribunal is so well established, and because that right is so clearly subverted by an agreement of this kind, we reject the defendants' contention that they had no fair notice.

The right to a fair and impartial trial for the resolution of guilt lies at the very heart of the constitutional guarantee of due process, as the case law of the Supreme Court and this circuit reflects. In *In re Murchison*, 349 U.S. 133 (1955), a Michigan judge who had presided over a one-person "judge-grand jury" later, in separate proceedings, adjudged witnesses in contempt for their conduct before him at the hearing. *Id.* at 133-34. The Supreme Court held this to be a violation of due process, opening its discussion of the law with the following passage: "A

fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136. The Court warned that " '[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' " *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Similarly, the Court held in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." 446 U.S. at 242. Among the concerns protected by this rule, the Court noted, is the preservation of

> both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done" by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951)).

This circuit has also clearly acknowledged the fundamental right to a fair and unbiased adjudication of guilt. We defined the basic elements of due process not simply as notice and the opportunity to be heard,[2] but "to be

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[2] The defendants claim that all of those whom they conspired to injure received the fundamental tenets of due process: notice and an opportunity to be heard. But due process

heard *by a fair and impartial tribunal.*" *Sill v. Pennsylvania State Univ.*, 462 F.2d 463, 469 (3d Cir. 1972) (emphasis added). Moreover, we announced unambiguously that "[i]f someone is deprived of his right to an impartial tribunal, then he is denied his constitutional right to due process, regardless of the magnitude of the individual and state interest at stake, the risk of error and the likely value of additional safeguards." *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 138 (3d Cir. 1985). Indeed, we emphasized that "[t]he unfairness that results from biased decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures." *Id.*

The defendants attempt to escape the clear import of these teachings by pointing out that they arose in the context of misconduct on the part of the decision maker, and that no decided case imposes criminal liability for violating § 241 by influencing or attempting to influence a decision maker. However, where, as here, the civil right allegedly violated is defined in the preexisting case law in a way that gave clear notice that the defendant's proposed conduct would abridge it, a prior conviction on analogous facts is not necessary. This is clear from the

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cannot be satisfied when the state provides a "hearing" at which the judge is not really listening or before which the decision has already been made. A myriad of cases hold that mere notice and hearing are not enough if "the state has contrived a conviction through the pretense of trial." *See, e.g., Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (deliberate presentation of perjured testimony by the State); *Napue v. Illinois*, 360 U.S. 264 (1959) (same); *Pyle v. Kansas*, 317 U.S. 213 (1942) (same).

Supreme Court's recent decision in *United States v. Lanier*, 117 S. Ct. 1219 (1997).

Lanier was convicted under 18 U.S.C. § 242 for violating the constitutional rights of five women by assaulting them sexually while he was serving as a state judge. Section 242 prohibits "the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" by anyone acting "under color of . . . law."[3] The Sixth Circuit Court of Appeals set aside the conviction for "lack of any notice to the public that this ambiguous criminal statute included simple or sexual assault crimes within its coverage." *United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1997). The Supreme Court unanimously reversed, holding that the Court of Appeals had employed an incorrect standard for determining whether particular conduct falls within the proscriptions of § 242. *United States v. Lanier*, 117 S. Ct. 1219 (1997). As the Court pointed out, the "touchstone is whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 1225.

The Court of Appeals in *Lanier* recognized two prerequisites for a conviction under § 242:(1) a prior decision of the *Supreme Court* recognizing the constitutional right at issue, and (2) a prior conviction in a factual situation

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[3] Section 242 is thus the substantive counterpart to the conspiracy statute in 18 U.S.C. § 241, which is the focus of this appeal. Section 241 forbids conspiracies to violate federally protected rights, whether the conspirators act under color of law or not.

"fundamentally similar" to the one at bar. The Supreme Court rejected this view. It noted that no case has confined the range of relevant decisions to Supreme Court precedent. *Id.* at 1226. As for factual similarity, the Court pointed out that it had upheld convictions under § 241 despite "notable factual distinctions" between prior decisions and the convictions at issue "so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights." *Id.* at 1227. It conceded that "[i]n some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Id.* "But," the Court continued,

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

Id. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

This case falls squarely within the language just quoted. No earlier case leaves open whether prejudicing a judge against a defendant violates the defendant's right to a fair and impartial trial; rather, the "general constitutional rule already identified in the decisional law" – that people are entitled to fair adjudication of their guilt

before an impartial tribunal – "applies with obvious clarity to the specific conduct in question." We therefore affirm the conviction for conspiracy to violate civil rights.

III. Mail Fraud Conspiracy

The defendants were convicted of a conspiracy that contemplated using the United States mail to deprive the Commonwealth of Pennsylvania and its citizens of the honest services of public employees. The indictment alleges that this agreement contemplated that the defendants would cause the following documents to be sent through the United States mail by the Statutory Appeals Court to the parties and the Department of Transportation ("DOT"): (1) notices of dismissals, (2) notices of convictions, and (3) "notices of favorable disposition." App. at 42, 51, 53. The government insists that the defendants contemplated that these documents would be sent through the mail in furtherance of their conspiracy. While we agree that the record will support an inference that the defendants expected these notices to be dispatched by mail, we cannot uphold the defendants' mail fraud convictions on this basis. Because mailing of these notices was required by law as an integral and necessary part of the court's adjudication of cases, and because any deprivation of the honest services of public employees had been completed in each instance before the notice of disposition was mailed, the mailings of notices of case disposition as a matter of law were not in furtherance of the alleged conspiracy.

"The mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use

of the mails is part of the execution of the fraud." *Kann v. United States*, 323 U.S. 88, 95 (1944). As we explained in *United States v. Tarnopol*, 561 F.2d 466, 471-72 (3d Cir. 1977) (internal citations omitted):

> In each case the question is whether or not the "mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute." Moreover . . . "the close relation of the mailings to the scheme does not turn on time or space, but on the dependence in some way of the completion of the scheme or the prevention of its detection on the mailings in question." Thus, mailings taking place after the object of the scheme has been accomplished, or before its accomplishment has begun, are not sufficiently closely related to the scheme to support a mail fraud prosecution. Nor are routine mailings required by law which are themselves intrinsically innocent even though they take place during the course of carrying out a fraudulent scheme, the objective of which is the embezzlement of funds received in response to the mailings.

We derived these governing principles in *Tarnopol* in large part from *Parr v. United States*, 363 U.S. 370 (1960), a case factually similar to that before us. The defendants in *Parr* were charged with a scheme to embezzle funds from a public school district in Texas. The mailings alleged to have been in furtherance of their conspiracy included notices of tax assessments dispatched by the district to local residents and the tax payments sent to it in response. Incoming tax revenue was either immediately converted by the defendants or deposited in the district's account, on which the defendants issued and cashed

checks payable to fictitious persons or in consideration of fictitious goods and services. The scheme also allegedly included the defendants' securing gasoline and other products and services with school district credit cards, with the knowledge that the mails would be used to collect from school funds. Although the Court acknowledged this "brazen scheme to defraud," it explained that the offenses described were essentially state crimes, and they would constitute federal mail fraud only if the mailings charged in the indictment were made " 'for the purpose of executing such scheme.' " *Parr*, 363 U.S. at 385 (quoting 18 U.S.C. § 1341).

Because the district was legally compelled to assess and collect taxes for school purposes, and the taxpayers were legally obliged to respond, the Court held that the mailings in connection with the collection of revenue could not support a mail fraud conviction even though the scheme to embezzle could not have succeeded without tax revenue. Rejecting the government's arguments that the mailings, even if innocent in themselves, were "steps in a plot," the Court remarked that no case had ever held that "a thing which the law required to be mailed may be regarded as mailed for the purpose of executing a plot or scheme to defraud." *Id.* at 390. The Court stressed that: (1) the district was legally required to assess and collect taxes; (2) the indictment did not charge and the evidence did not prove that the taxes assessed exceeded the district's legitimate needs or that they were in any way unlawful; and (3) in fulfilling its legal duty to collect and report the receipt of taxes, the district was practically obliged to permit taxpayers to use the mail. *Id.* at 391. In a passage of central importance to this appeal,

the Court summarized its holding with respect to the tax collection mailings as follows:

> [I]t cannot be said that mailings made for or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing . . . plan to steal . . . some indefinite part of [the district's] moneys.

Id.

The Court also held that the mailings required to collect for the credit card purchases would not support a mail fraud conviction. The "scheme in each case had reached fruition when [the defendants] received the goods and services. . . . It was immaterial . . . to any consummation of the scheme, how the [oil company] . . . would collect from the [District]." *Id.* at 393 (quoting *Kann v. United States*, 323 U.S. 88, 94 (1944)) (internal quotation mark omitted). Accordingly, it could not be said "that the mailings in question were for the purpose of executing the scheme, as the statute requires." *Id.*

Parr's holding with respect to the credit card portion of the scheme was followed in *United States v. Maze*, 414 U.S. 395 (1974). *Maze* also involved credit card fraud. The Court held that mailings of credit card invoices from a motel to a bank for the purpose of securing reimbursement for the goods and services supplied to Maze by the motel were not "for the purpose of executing [the defendant's] scheme." *Id.* at 405. The Court pointed out that Maze's "scheme reached fruition when he checked out of the motel." *Id.* at 414. In reaching its conclusion, the

Court distinguished *United States v. Sampson*, 371 U.S. 75 (1962), on the ground that, while Maze had received no benefit from the mailings, the mailings in the *Sampson* scheme "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *Id.* at 403.

We find this case indistinguishable from *Parr*. The Statutory Appeals Court was charged by law with adjudicating specified cases, just as the school district in *Parr* was charged with running a school system. Its mailings to the parties and the DOT, like the tax mailing in *Parr*, were required by law as a part of the court's exercise of its responsibilities. *See* Pa. R. Crim. P. 58(b)(2), 63(b)(2), 68(b)(2), 80, 9024, 9025; Pa. R. Civ. P. 236(a)(2); Pa. Stat. Ann. tit. 75, § 6323 (West 1996). Given the volume of business that the court conducted, it had little choice but to transmit these required notifications by mail. The notices of dispositions dispatched by the court, like the tax mailings in *Parr*, performed precisely the function they were intended by law to perform: they faithfully reported the court's disposition of the case. As in *Parr*, the relevant mailings would, of necessity, have been made whether or not the conspiracy existed, and they would have performed precisely the same function in the absence of the conspiracy that they performed during its continuance.

We also find an analogy between this case and the credit card aspects of *Parr* and of *Maze*. The objective of this conspiracy was to deprive citizens of the honest services of public employees charged with processing

and adjudicating cases. That objective would "reach fruition" when the defendants' efforts caused a different disposition by the court than would otherwise have been made. In short, all that the conspirators needed to fix in order to achieve the object of their agreement was the disposition of a case. While routine mailings to the parties and the DOT and between the DOT and the parties could reasonably have been expected to follow in the ordinary execution of duties imposed by law, by the time notices of dispositions were dispatched, the conspiracy had either succeeded or failed, the legal consequences of an acquittal or conviction had been established, and the routine reporting of the dispositions simply was not a part of the conspirators' execution of their scheme. Nor did that routine reporting have the effect of lulling anyone into a false sense of security or otherwise making the conspirators' apprehension less likely.[4]

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[4] *Schmuck v. United States*, 489 U.S. 705 (1989), a case relied upon heavily by the government, appears to us to support the position of the defendants. In *Schmuck*, a used car distributor was charged with devising and executing a scheme to defraud retail automobile customers by rolling back the odometers and inflating the prices he charged to dealers based on the lower mileage readings. The Court held that the mailing requirement was satisfied by the dealers' mailings of the title application forms. The Court distinguished *Parr* on the basis that the annual tax mailings in *Parr* continued regularly regardless of the scheme, while the mailings from the dealers in *Schmuck* were a direct result of and would not have occurred but for the fraudulent scheme. *Schmuck*, 489 U.S. at 713 n. 7. Here also, the court regularly mailed notices to parties and the DOT in every case, whether or not the defendants had attempted to influence the result.

The scope of the federal mail fraud statute is limited. The Supreme Court has clearly held that legally required mailings in circumstances like those in this case cannot be deemed to have been made "for the purpose of executing" a fraudulent scheme. We therefore reverse the mail fraud conspiracy convictions.[5]

IV. Conclusion

For the reasons set forth above, we will affirm the convictions for conspiracy to violate civil rights and will reverse the convictions for conspiracy to commit mail fraud. We will remand for resentencing.

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[5] In a footnote in its brief, the government points to testimony that the defendants caused notices to be mailed of the time, date, and place of the hearings in the various cases. Appellee's Br. at 36 n. 4. Even if these had been alleged in the indictment to be mailings in furtherance of the conspiracy, we could not sustain the defendants' mail fraud convictions on the basis of these notices. They too are a necessary part of the Statutory Appeals Court's carrying out its charge to adjudicate the cases within its jurisdiction. These notices were sent in all cases and their function was precisely the same during the conspiracy as it would have been without that conspiracy.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-3239, 96-3240 and 96-3241

UNITED STATES OF AMERICA

v.

WALTER V. CROSS, a/k/a Bobo,
Appellant in No. 96-3239

JULES C. MELOGRANE,
Appellant in No. 96-3240

NUNZIO MELOGRANE,
Appellant in No. 96-3241

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal Nos. 95-cr-00233-1,
94-cr-00233-2 & 94-cr-00233-3)

Present: Stapleton, Greenberg and Cowen, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel August 12, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered in W.D. Nos. 94-CR-00233-01, 94-CR-00233-02 and 94-CR-00233-03 on April 16, 1996, be, and the same are hereby affirmed insofar as the convictions for conspiracy to violate civil rights and reversed insofar as the convictions for conspiracy to commit mail

fraud and the causes are remanded to the said District Court for resentencing. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: October 21, 1997

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-3239, 96-3240 and 96-3241

UNITED STATES OF AMERICA

v.

WALTER V. CROSS, a/k/a Bobo,
Appellant in No. 96-3239

JULES C. MELOGRANE,
Appellant in No. 96-3240

NUNZIO MELOGRANE,
Appellant in No. 96-3241

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: Jan. 16, 1996

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-3239, 96-3240 and 96-3241

UNITED STATES OF AMERICA

v.

WALTER V. CROSS, a/k/a Bobo,
Appellant in No. 96-3239

JULES C. MELOGRANE,
Appellant in No. 96-3240

NUNZIO MELOGRANE,
Appellant in No. 96-3241

SUR PETITION FOR PANEL REHEARING

BEFORE: STAPLETON, GREENBERG and COWEN, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and no judge who concurred in the decision having asked for panel rehearing, the petition for panel rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: Jan. 16, 1998

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-3239, 96-3240 and 96-3241

UNITED STATES OF AMERICA

v.

WALTER V. CROSS; JULES C. MELOGRANE & NUNZIO MELOGRANE,
Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until February 25, 1998.

/s/ Walter K. Stapleton
Circuit Judge

Dated: FEB. 13, 1998